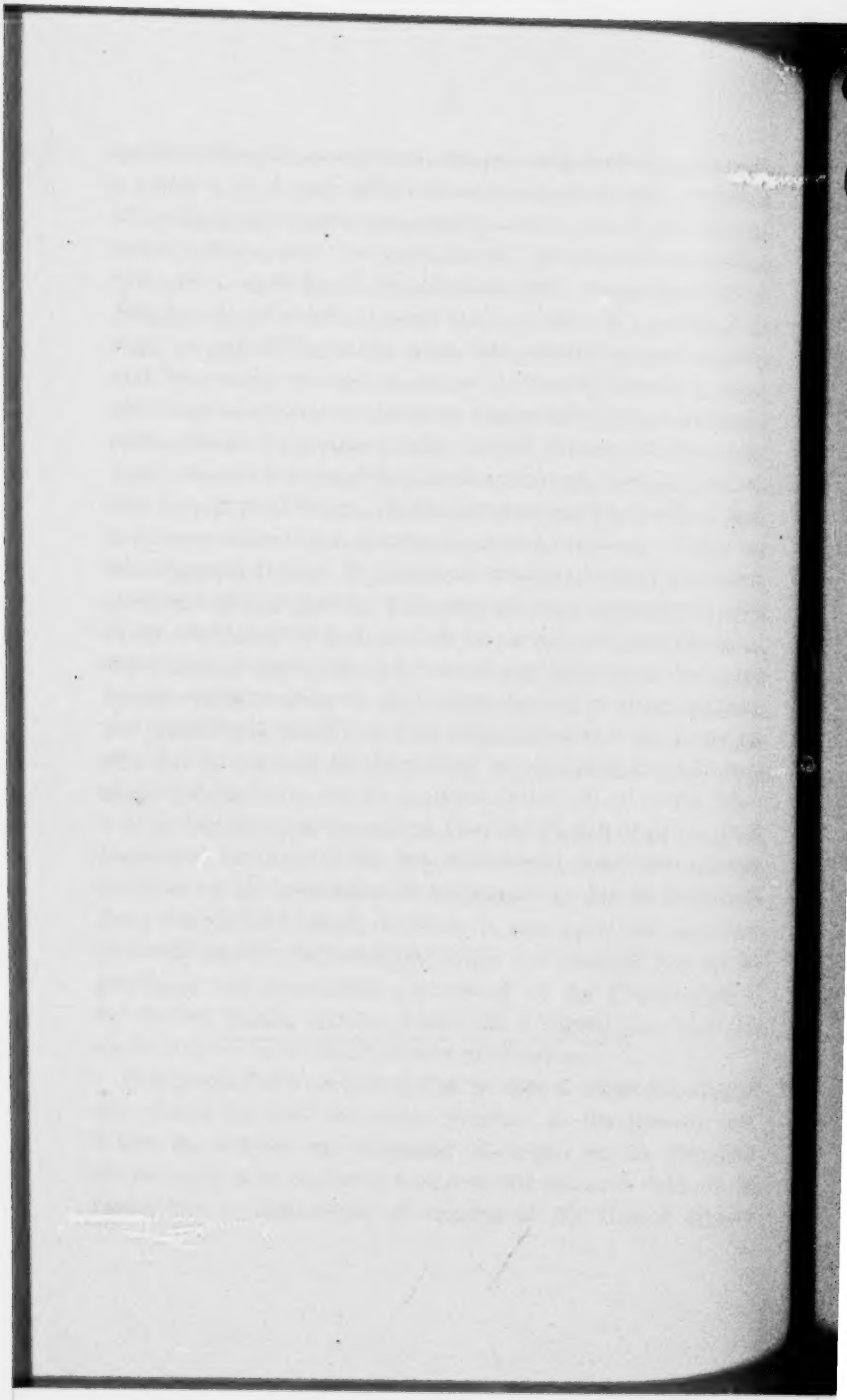

No. 505 1899

Brief of Cook for D. C. C.

Office Supreme Court U. S.
FILED
MAR 10 1900
JAMES H. McKENNEY
Clerk

Filed Mar. 10, 1900.

No. 505

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

ZEB. V. WALSER, Attorney General for N. C.,
AND
C. A. COOK,
Counsel for Defendant in Error for the purposes of these motions.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

And now comes the defendant in error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because the judgment from which said writ of error purports to have been taken is the judgment of the Supreme Court of one of the United States, to-wit, the Supreme Court of North Carolina.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment from which said writ of error purports to have been taken, because, although the record in the said cause shows that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ZEB. V. WALSER,
Att'y Gen'l of N. C., and
C. A. COOK,
Counsel for Defendant in Error
for the purposes of these motions.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1899.

To R. O. Burton, Esq., *Counsel for Plaintiffs in Error:*

Please take notice that on Monday, the 12th day of March, 1900, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

Zeb. V. Walser,
Att'y Gen'l of N. C., and
C. A. Cook,
Counsel for Defendant in Error
for the purposes of these motions.

No.....

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

The defendant in error moves the Court to dismiss the writ and affirm the judgment of the Supreme Court of North Carolina.

The following are the facts:

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor Judge Sutton, and a jury, and were convicted and sentenced to two years imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

At the time of the commission of the offence, and also at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting defendant a new trial.

At the time of the commission of the offence, and at the time of the trial in the Criminal Court of Edgecombe County, there were two District Criminal Courts in the State of North

Carolina, to-wit, the Eastern District Criminal Court and the Western District Criminal Court. In the Eastern District, in which the county of Edgecombe is situated, the State, since March 6, 1899, is allowed by statute to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial; whereas, in the Western District the State is not allowed by statute such appeal.

At the June Term, 1899, of the Superior Court of Edgecombe County appeal of the plaintiffs in error was heard and judgment awarding them a new trial was given. From this judgment the State, on July 7, 1899, appealed to the Supreme Court, and at September Term, 1899, thereof, the judgment of the Superior Court of Edgecombe County was overruled, and the judgment of the Criminal Court of Edgecombe County was affirmed

Questions of Law Raised by the Writ of Error.

The plaintiffs in error assign the following errors of law as the foundation for issuing of the writs:

First. That chapter 471, section 6 thereof of the Public Laws of 1899, is *ex post facto* as to the offence charged in the bill of indictment against the plaintiffs in error.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court, granting a defendant a new trial, to the Supreme Court.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter-books had theretofore been seized, under an attachment by the sheriff of

Edgecombe County in a civil action, and were brought into court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

ARGUMENT.

The defendant in error contends that this Court has no jurisdiction, for that the record does not disclose the fact that any Federal question was raised in the trial of the case in either of the courts in which the case was heard, nor was such question raised. (See opinion by Justice Clark.)

> Dewey v. Des Moines, 173 U. S., 193; and cases there cited.

After the decision was rendered by the Supreme Court of North Carolina, the plaintiffs in error filed an application for re-argument, and therein undertook to raise a Federal question, which had not theretofore been raised, (see application in record), which was in substance and effect a motion for a rehearing, and which was overruled.

And defendant in error contends that such suggestion comes too late.

> Miller v. Cornwall R. R. Co., 168 U. S., p. 131.
> Duncan v. Missouri, 152 U. S., p. 377.

The defendant in error contends that section 6, of chapter 471, of the Laws of 1899, is not *ex post facto* as to the offence charged against the plaintiffs in error.

Ex post facto laws are—

1. Such that make an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2. Which aggravates an offence, or changes the punishment thereof, and makes it greater than it was when it was committed.

3. Which alters the rules of evidence and requires less testimony, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3d Dallas, at bottom of p. 390.
Duncan v. Missouri, 152 U. S., 377.

We submit that section 6, of chapter 471, of the Laws of 1899, does not make criminal that which was theretofore innocent and lawful; that it does not change the punishment which attached to the crime of conspiracy to defraud at the time said offence was committed; nor does it change the rules of evidence so as to require less testimony, or different testimony, in order to convict the plaintiffs in error.

Cooley Const. Lim., 5 Ed., p. 327.
Thompson v. Missouri, 171 U. S., 380
Hopt v. Utah, 110 U. S. R., pp. 587, 588, 589 and 590.
12 Am. & Eng. Enclyp., p. 535, and cases there cited, that mode of procedure may be changed.
Kring v. Missouri, 107 U. S., 221.

We submit that the the plaintiffs in error are not denied the equal protection of the laws as provided by the fourteenth amendment to the Constitution of the United States, because the State is allowed to appeal, as hereinbefore stated, in the Eastern District, and is not allowed such appeal in the Western District. That this attitude of the law does not deprive the plaintiffs in error of any right enjoyed by any other citizen of the State, and the plaintiffs in error have all the rights of citizens of the State as conferred by the Constitution and laws thereof. That the fact that the State has not seen proper to grant unto itself the right of appeal in the Western District, as has been allowed in the Eastern District, in nowise

deprives the plaintiffs in error of any rights guaranteed to them by the Constitution and laws of the State, and, therefore, the plaintiffs in error are not deprived the equal protection of the laws.

Guthrie on the Fourteenth Amendment, Chap. IV.
Missouri v. Lewis, 101 U. S., pp. 23, 31, 68; and case cited above.
Hayes v. Missouri, 120 U. S., p. 68.

We submit that the use of the ledger book and counter-book of the plaintiffs in error as evidence against them, was not compelling the plaintiffs in error to become witnesses against themselves. These books constituted "real evidence," and because they had been the personal property of the plaintiffs in error, and had theretofore been seized by the sheriff in a civil action and were in his (the sheriff's) possession at the time of the trial, and were used by the State on the trial, does not render them incompetent. A person who put his foot in a track, stolen goods found in a person's house, may be used as evidence against him.

State v. Graham, 74 N. C. R., at p. 646.
State v. Garrett, 71 N. C., 85.
Walker v. Texas, 7 Tex. App., 245.
Best on Evidence, sec. 183.

This case does not come under the rule laid down in *Boyd* v. *U. S.*, 116 U. S., 616, for there, Boyd's invoice was in his own custody, and, by attachment, forced to produce it in court; while, in this case, the ledger and counter-books of plaintiffs in error had theretofore been seized in a civil action under legal process as *property*, and had been taken from the custody of defendants in error by due process of law. And having thus forfeited their right to the possession and custody thereof, can not complain that the legal owners and custodians thereof offered same in evidence against them.

The prohibition of Article V of the Constitution of the United States "that no person shall be compelled in any criminal case to be a witness against himself," does not apply to the courts of any State, and is only applicable to United States courts.

Barren v. The City of Baltimore, 7th Peters, p. 243.
Fox v. Ohio, 5th Howard, p. 434.
Smith v. The State of Maryland, 18th Howard, p. 76.
Withers v. Buckley and others, 20th Howard, p. 90.
Twitchell v. The Commonwealth, 7th Howard, p. 321.

This last point can not be considered, because the question was not raised in the Criminal Court of Edgecombe County, nor in the Superior Court of that county, as a Federal question, in that it violated Article V of the Constitution of the United States, nor was it passed on by the Supreme Court of North Carolina as a Federal question.

Defendant in error insists, that although the record may show that this Court has jurisdiction, yet, it is manifest the writ of error was taken for delay only, and the question on which the jurisdiction depends is so frivolous as not to need further argument; and, in view of the fact that these questions presented have so frequently been decided by this Court, asks that the motion to affirm be granted.

Whitney v. Cook, 99 U. S., 607.
Hinckley v. Morton, 103 U. S., 764.
Micas v. Williams, 104 U. S., 556.
Swope v. Leffingwell, 105 U. S., p. 3.
Chaunte City v. Trader, 132 U. S., 210.
Kauffman v. Wooters, 138 U. S., 285.
Sugg v. Thornton, 132 U. S., 524.

Counsel for Defendant in Error
for the purposes of these motions.

No. 189.

Mot. of Cook & Harris for D. G. 1900

Filed Sept. 22, 1900.

Office Supreme Court
FILED
1900
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA, Defendant in Error.

And now comes the defendant in error, by its counsel appointed in that behalf, and moves the Court, by virtue of section 710 of the Revised Statutes of the United States, and in conformity to Rule Twenty-six, to advance for argument the above-entitled criminal action.

C. A. COOK,
J. C. L. HARRIS,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA, Defendant in Error.

To ROBERT O. BURTON, ESQ.,
Counsel for Plaintiffs in Error:

Please take notice, that on the third Monday of October, 1900, being the [illegible] day of that month, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

Annexed hereto is a copy of the statement of the case and the reasons in support of the motion as required by Rule Twenty-six.

C. A. COOK,
J. C. L. HARRIS,
Counsel for Defendant in Error.

Statement of the Case

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor, *Judge Sutton*, and a jury, and were convicted and sentenced to two years' imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

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First. That chapter 471, section 6 thereof, of the Public Laws of 1899, is *ex post facto* as to the offence charged in the bill of indictment against the plaintiffs in error.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court, granting a defendant a new trial, to the Supreme Court.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter books had theretofore been seized, under an attachment by the Sheriff of Edgecombe County, in a civil action, and were brought into Court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

Reasons for the Motion to Advance.

Because it is a matter of public importance to the State of North Carolina that the criminal law should be enforced as speedily as possible, consistent with the rights of the plaintiffs in error; and because section 710 of the Revised Statutes of the United States appears to be mandatory on the Court and intends that this course shall be pursued whenever a motion to this effect is made by the proper party.

C. A. Cook,
J. C. L. Harris,
Counsel for Defendant in Error.